

IN THE COURT OF APPEALS OF IOWA

No. 0-624 / 09-1787
Filed September 22, 2010

**DOROTHY J. ISAKSON and
HANS ISAKSON,**
Plaintiffs,

vs.

**COLLEGE SQUARE MALL PARTNERS,
L.L.C., GK DEVELOPMENT, INC., and
JEFFREY ASSINK d/b/a C & J
CONSTRUCTION,**
Defendants.

**COLLEGE SQUARE MALL PARTNERS,
L.L.C. AND GK DEVELOPMENT, INC.,**
Cross-Claim Plaintiffs-Appellees,

vs.

**JEFFREY ASSINK d/b/a
C & J CONSTRUCTION,**
Cross-Claim Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

The cross-claim defendant appeals from the district court's order granting indemnification to the cross-claim plaintiffs. **AFFIRMED.**

Stephen J. Powell and Jim D. DeKoster of Swisher & Cohrt, P.L.C., Waterloo, for appellant.

David A. Roth of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellees.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

A woman who slipped and fell in an allegedly ice-covered parking lot sued the owner and manager of the property, as well as their snow removal contractor. None of the defendants were found to be at fault, but the owner and manager sought indemnification for their attorney fees and costs from the snow removal contractor. The district court granted indemnification, and the snow removal contractor now asserts the district court erred in so doing. Because we find the parties' contract provided for indemnification regardless of whether the indemnitor was found at fault in the underlying suit, we affirm.

I. Background Facts and Proceedings.

College Square Mall Partners, L.L.C. owns a shopping mall that is managed by GK Development, Inc. In 2006, College Square contracted with Jeffrey Assink d/b/a C & J Construction for the snow and ice removal from the mall's parking lots from September 15, 2006, to September 15, 2007. The Service Agreement contained the following indemnification clause:

Section 8. Indemnification.

To the fullest extent permitted by applicable law, Service Contractor shall defend, indemnify and hold harmless Owner and Manager and their respective officers, directors, employees, agents, shareholders, partners, joint ventures, affiliates, successors and assigns from and against any and all liabilities, obligations, claims, demands, causes of action, losses, expenses, damages, fines, judgments, settlements and penalties, including, without limitation, costs, expenses and attorneys' fees incident thereto, arising out of, based upon, or occasioned by or in connection with:

(a) Service Contractor's performance of (or failure to perform) the Contract Duties;

(b) a violation of any laws or any negligence, gross negligence or willful misconduct by Service Contractor or its affiliates, subcontractors, agents or employees during performance of the Contract Duties; and/or

(c) a breach of this Agreement by Service Contractor or any of its affiliates, subcontractors, agents or employees.

The aforesaid obligation of indemnity shall be construed so as to extend to all legal, defense and investigation costs, as well as all other reasonable costs, expenses and liabilities incurred by the party to be indemnified, from and after the time at which the party indemnified receives notification (whether verbal or written) that a claim or demand is to be made or may be made.

Except as may be otherwise provided by applicable law or any governmental authority, Owner's or Manager's right to indemnification under this section shall not be impaired or diminished by any act, omission, conduct, misconduct, negligence or default (other than gross negligence or willful misconduct) of Owner or Manager or any employee of Owner or Manager who contributed or may be alleged to have contributed thereto.

On March 3, 2007, Dorothy Isakson fell on snow and ice in the mall's parking lot and injured her leg. Dorothy and her husband, Hans Isakson, filed suit on June 29, 2007, alleging Assink, College Square, and GK Development were negligent in failing to keep the parking lot clear of snow and ice.

Because the Isaksons alleged negligence in clearing the snow and ice, College Square and GK Development tendered the defense of the claim to Assink. Assink declined. On October 30, 2008, College Square and GK Development filed a cross-claim seeking indemnification from Assink. Before trial, the Isaksons and Assink settled with each other for \$10,000. The settlement agreement released Assink from liability, but did not release College Square and GK Development. No liability was admitted by Assink.

On April 28-30, 2009, the Isaksons' claims against College Square and GK Development went to trial. Before the case went to the jury, the district court denied College Square and GK Development's request that the jury be asked to apportion possible fault to Assink. The court reasoned there was no evidence of Assink's fault. The jury subsequently found College Square and GK

Development were not at fault either. On October 22, 2009, the district court ruled on College Square and GK Development's cross-claim. It found they were entitled to indemnification by Assink for attorney fees and costs in the amount of \$21,018.04. Assink appeals.

II. Standard of Review.

We review a challenge to a district court's grant of attorney fees for an abuse of discretion. We will reverse a court's discretionary ruling only when the court rests its ruling on grounds that are clearly unreasonable or untenable. When reviewing an attorney fees award for an abuse of discretion, we will correct erroneous applications of the law.

NevadaCare, Inc. v. Dep't of Human Servs., 783 N.W.2d 459, 469 (Iowa 2010).

III. Indemnification.

Assink asserts that the district court erred in holding the Service Agreement's indemnification clause required him to pay College Square and GK Development's attorney fees and costs. Attorney fees may be recoverable if authorized by contract. *FNBC Iowa, Inc. v. Jennessey Group, L.L.C.*, 759 N.W.2d 808, 809 (Iowa Ct. App. 2008). The parties' contract contained an indemnification provision, which stated in relevant part:

To the fullest extent permitted by applicable law, [Assink] shall defend, indemnify and hold harmless [College Square Mall and GK Development] . . . from and against any and all liabilities, obligations, claims, demands, causes of action, losses, expenses, damages, fines, judgments, settlements and penalties, including, without limitation, costs, expenses and attorneys' fees incident thereto, arising out of, based upon, or occasioned by or in connection with:

(a) Service Contractor's performance of (or failure to perform) the Contract Duties;

(b) . . . any negligence, gross negligence, or willful misconduct by Service Contractor . . . during performance of the Contract Duties

Assink asserts the indemnification provision did not apply in the present case because he was not found to be negligent and, in fact, properly performed all of his "Contract Duties." But the indemnification provision was broad. It provided Assink had a duty to defend, indemnify, and hold harmless for "any and all" causes of action "incident thereto, arising out of, based upon, or occasioned by or in connection with" Assink's performance or failure to perform the snow and ice removal. The Isaksons' suit alleged Assink, College Square, and GK Development were "negligent and at fault, including joint and several liability, based on their failure to provide adequate snow and ice removal and remediation" These allegations, we believe, triggered Assink's duty to defend since the cause of action was, at a minimum, "incident to" the performance of the snow removal contract. Having failed to provide a defense to College Square and GK Development, Assink must now compensate them for their attorney fees and costs.

To determine whether Assink had a duty to pay his codefendants' attorney fees and costs even though he was not found negligent, we must examine the language of the parties' agreement. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 571 (Iowa 2002) ("A contract for indemnification is generally subject to the same rules of formation, validity and construction as other contracts."); *Bunce v. Skyline Harvestore Sys., Inc.*, 348 N.W.2d 248, 250 (Iowa 1984) (indicating that the court's goal is to give effect to the intention of the parties and, thus, it looks to the words of the indemnifying agreement). As in *McNally & Nimergood*, we have an indemnification clause that was "broad and all-inclusive." See *McNally & Nimergood*, 648 N.W.2d at 571

(stating that a “lease agreement was broad and all-inclusive” where it “provided for indemnification for all damage claims ‘arising from or in connection with the use or operation of the [crane].’”). There was no requirement that Assink had to be found negligent in performing the snow and ice removal.

According to one rule of construction, “indemnification contracts will not be construed to permit an indemnitee to recover for its own negligence unless the intention of the parties is clearly and unambiguously expressed.” See *id.* at 571. Thus, to prevail on a contractual indemnity claim, the indemnitee must normally establish that he or she was not negligent. However, there is no rule of construction that requires the indemnitee to prove the indemnitor was negligent. See *Correia v. Prof'l Data Mgmt., Inc.*, 693 N.Y.S.2d 596, 600 (App. Div. 1999) (“In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant.”).

Assink also argues that the trial established he fully performed his contractual duties—and that is why the district court refused to allow the jury to allocate potential fault to him. In particular, Assink removed snow from and applied salt on the parking lot exactly as directed by the mall’s operations manager. The only issue when the case went to the jury was whether College Square had given him the right instructions. But this argument overlooks, among other things, the difference between the duty to defend and the duty to indemnify for an adverse judgment. “The duty to defend is broader than the duty to indemnify.” *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d

648, 656 (Iowa 2002) (quoting *First Newton Nat'l Bank v. Gen. Cas. Co.*, 426 N.W.2d 618, 630 (Iowa 1988)). The duty to defend “rests solely on whether the petition contains any allegations that arguably or potentially bring the action within the policy coverage.” *Id.* (quoting *Employers Mut. Cas. Co. v. Cedar Rapids Television Co.*, 552 N.W.2d 639, 641 (Iowa 1996)). Assink had a duty to defend College Square and GK Development from the outset of this case, a duty that it breached.

In sum, the Service Agreement imposed on Assink a duty to defend, indemnify, and hold harmless College Square and GK Development. See 42 C.J.S. *Indemnity* § 24 at 33 (2007) (“An indemnitor is liable for attorney’s fees whether the defense is successful or not.”); see also *Shannon v. Kaiser Aluminum & Chem. Corp.*, 749 F.2d 689, 690-91 (11th Cir. 1985) (same). We find the district court correctly ordered Assink to pay College Square and GK Development’s attorney fees and costs and therefore affirm.

AFFIRMED.